Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	
Bell Operating Company	)	CC Docket No. 95-20
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review-	)	CC Docket No. 98-10
Review of Computer III and ONA	)	
Safeguards and Requirements	)	

REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, for itself and its affiliated companies ("BellSouth"), hereby submits this Reply in response to comments filed pursuant to the *Further Notice of Proposed Rulemaking* in the above referenced proceeding.[1]

Consistent with its obligations under Section 11[2] of the Communications Act,[3] the Commission proposed in the *Further Notice* to eliminate or reduce many of the regulatory burdens that currently are imposed on Bell operating companies' ("BOCs") enhanced service operations. The Commission's proposals are intended to streamline BOCs' abilities to develop and deploy new technologies and innovative services that will benefit the American public. In

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1 *Computer III Further Remand Proceeding: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket No. 95-20, CC Docket No. 98-10, *Further Notice of Proposed Rulemaking*, FCC 98-8 (rel. Jan. 30, 1998) ("*Further Notice*").

2 47 U.S.C. § 161. By this section, Congress directed the Commission to "review all regulations. . . that apply to the operations or activities of any providers of telecommunications service, . . . determine whether any such regulation is no longer necessary in the public interest, . . . and repeal or modify any regulation it determines to be no longer necessary."

3 The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

particular, the Commission proposed to eliminate burdensome and costly "safeguard" regulations that deter or delay new service introduction, and to rely instead on the forces of competition engendered by passage of the Telecommunications Act of 1996[4] as the appropriate check on conjectural access discrimination.

The Commission received volumes of substantial and credible evidence that a policy permitting structural integration of BOCs' basic services and intraLATA information services can and does generate measurable public benefits. The evidence also showed, however, that the benefits that *may* be attained through structural integration are unduly delayed, and may even be denied, through the service specific approval process of CEI plan filing and review. Additionally, the evidence showed that the "safeguards" on BOCs' information service operations are not necessary to ensure that the information services market is and remains highly competitive and robust, particularly in light of the 1996 Act.

Conversely, the Commission received no credible evidence of any public benefit of a separate subsidiary requirement. Moreover, parties opposing continued and greater structural relief for the BOCs' information service operations misconstrue Congress's intent in its enactment of limited structural separation requirements in the 1996 Act for certain purposes other than intraLATA information services. Finally, no convincing showing was made that "pure" information service providers ("ISPs") must be granted rights like those of carriers under Section 251 of the Act in order to ensure that they have access to unbundled services or network elements they desire.

In sum, the record again demonstrates that the net public benefits of structural relief materially outweigh any purported benefits of a separate subsidiary requirement for BOCs'

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[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the 1996 Act").

intraLATA information services. Accordingly, the Commission must act upon its obligation under Section 11 of the Act and eliminate the unnecessary regulatory constraints on BOCs' offerings of such services.

I. THE EVIDENCE OVERWHELMINGLY DEMONSTRATES THE PUBLIC BENEFITS OF STRUCTURAL INTEGRATION

For the second time in this proceeding, the BOCs have presented a wealth of objective and quantifiable data that demonstrates the substantial public benefits of structural integration. This data consist of information based on BOCs' actual experiences under both separate subsidiary requirements and structural integration policies and is supported by economic analyses that have quantified the relative consumer welfare impacts of two policy regimes. The record is clear that structural integration of BOCs' intraLATA information services and basic telecommunications services affects the public interest beneficially.

The record compiled in the earlier stage of this proceeding established that millions of individuals have directly benefited from the availability of the BOCs' voice messaging operations on an integrated basis. Whether the measure is presented in terms of number of customers,[5] revenues,[6] growth rates,[7] consumer welfare,[8] or any other measure,[9] the data

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[5] *See, e.g.*, April 7, 1995, Comments of: NYNEX at 20, 25; Bell Atlantic at 5, 10-11; US West at 12; SBC at 3, 13; Pacific at 16-17; BellSouth at 52-53.

[6] *See, e.g.*, April 7, 1995, Comments of: NYNEX at 20; Bell Atlantic at n. 7, n. 9, 8, 12; US West at 12; Ameritech at 3-4, 6; SBC at 7, 11-12; Pacific at 7, 9; BellSouth at 56, n. 69.

[7] *See, e.g.*, April 7, 1995, Comments of: NYNEX at 20-21, 25; Bell Atlantic at 8; US West at 12; Ameritech at 3; SBC at 8-9, 11-12; Pacific at 7-48.

[8] *See, e.g.*, Hausman and Tardiff study appended to each of the BOCs' April 7, 1995, comments, *passim*.

[9] See, e.g., April 7, 1995 Comments of: NYNEX at 26 (substantial price decreases); Bell Atlantic at 7 (creation of new markets), 8-9 (price decreases); US West at 12 (increased sales by competitors due to BOC's advertising of its own service); SBC at 10-26 (substantial competition and competitors in all market segments); Pacific at 18 (packaging of new and lower-priced

previously submitted lead to the inescapable conclusion that the public has benefited substantially under polices that permitted such integrated offerings. Those earlier showings have only been bolstered in the instant stage of this proceeding by the quantification of the consumer welfare *loss* suffered as these beneficial offerings were delayed by the constraints of a separate subsidiary requirement.[10]

Moreover, the benefits to consumers of the BOCs' integrated operations have not been at the expense of a competitively functioning marketplace.[11] To the contrary, the information services marketplace has continued to be among the fastest growing sectors of the national

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service options); BellSouth at 53 (rapid penetration growth showing previously existing, but unmet, demand for new services), 55 (new feature development in CPE based alternatives).

[10] *See*, Bell Atlantic Attachment A (Hausman, "Valuing the Effect of Regulation on New Services in Telecommunications").

[11] Opponents of structural relief for the BOCs historically have attempted to point to the Georgia Public Service Commission's decision regarding BellSouth's introduction of MemoryCall voice messaging service as "evidence" of actual or potential competitive abuses in information service markets by BellSouth specifically, and by other BOCs by implication. In its original comments in this proceeding, however, BellSouth thoroughly refuted these assertions with a comprehensive discussion addressing both the inaccuracies of the Georgia PSC's order as well as the mischaracterizations of its conclusions by opposing parties (and even by the Ninth Circuit). Consequently, only MCI continues in this proceeding to attempt to press the argument that the MemoryCall decision is indicative of likely misbehavior by BOCs. Because MCI's assertions are little more than a recitation of its earlier filed arguments, BellSouth responds here by incorporating its earlier filed comments anticipating and refuting such arguments. Those comments are attached for convenience as Attachment A.

The Commission should also take note that in reasserting its arguments, MCI has failed to correct egregious factual misstatements about the Georgia PSC's order that MCI has perpetuated before both this Commission and the Ninth Circuit, and that BellSouth pointed out in its previous reply comments. *Compare* MCI Comments at 48 (alleging that the Georgia order included a finding that BellSouth was using CPNI contrary to express prohibitions in BellSouth's CEI plan approval) *with* BellSouth's May 19,1995, Reply Comments at 13-15 (attached hereto as Attachment B) (noting that MCI offered no citation or other support for its contention because there is no such finding in the Georgia order). Repeated misrepresentations of fact to the Commission, particularly after the misrepresentations have been shown to be untrue, need not and should not be tolerated.

economy.[12] For example, estimates of the number of internet access providers feeding the seemingly insatiable appetite of internet users have grown from the 3000 providers suggested in the "recent" surveys relied upon by the Commission in crafting the *Further Notice* to some 4300 providers only a year later.[13] Further, some estimates suggest the demand for the services of these growing ranks of ISPs will increase to one billion users by the year 2000.[14]

The clear conclusion to be drawn here is twofold. First, BOCs are not inhibiting the development of, or competition in, information service markets through access discrimination or other hypothetical anticompetitive behavior. Second, notwithstanding claims by some that the ONA process has been a failure, ISPs have access to and are using telecommunications services from BOCs that enable the ISPs to offer their own new and innovative services and to introduce them rapidly.[15] That the information service marketplace has grown as explosively as it has thus confirms that the consuming public's demand for information services is not being thwarted by abusive tactics by BOCs.

In contrast with these tangible, substantial benefits to the consuming public that have burgeoned under the Commission's structural relief policies, the public interest analysis of opponents of structural integration consists of little more than hypothetical "worst case scenarios" of the dire consequences of structural relief. None have provided any quantification

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12 *See* Bell Atlantic Comments at 4-5 and n. 5, 6.

13 *Compare*, *Further Notice* at ¶ 36 *with* J. Rickard, Boardwatch Directory of Internet Service Providers (Fall 1997).

14 Bell Atlantic Comments at 5.

15 Indeed, the further inference to be drawn from this latter point is that BOCs are responding to the *marketplace demands* of ISPs, and there is no reason to believe that they will not continue to do so as competition to retain these customers' business continues to grow in the wake of the 1996 Act. Under this circumstance, the artifice of the ONA unbundling requirements and the associated 120-day request review process, which are only regulatory

or other analysis for weighing their speculative scenarios against the demonstrable and considerable benefits of structural relief. Accordingly, the record again compels a conclusion that the public interest is served by elimination of separate subsidiary requirements.

II. THE TELECOMMUNICATIONS ACT OF 1996 REFLECTS A CONGRESSIONAL PREFERENCE FOR STRUCTURAL INTEGRATION

Several parties erroneously contend that the 1996 Act reveals a Congressional preference for separate affiliates as the favored form of safeguard for various activities of the BOCs. These parties then contend that the Commission should be guided by this preference in its formulation of safeguards for BOCs' intraLATA information services. Contrary to these parties' assertions, however, the 1996 Act reflects a decided bias in favor of *elimination* of structural separation requirements.

Parties interpreting the Act as indicating a Congressional preference for separate affiliate safeguards variably cite statutory provisions that address BOCs' interLATA telecommunications services,[16] manufacturing activities,[17] interLATA information services,[18] and electronic publishing operations[19] in support of their contentions. Inspection of these separate affiliate requirements confirms just the opposite, however. That is, each of these provisions contains a specific sunset date,[20] indicating a Congressional desire that these requirements cease to exist.

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surrogates intended to ensure the availability of services that the marketplace already ensures, are redundant, at best.

16 47 U.S.C. § 272(a)(2)(B).

17 47 U.S.C. § 272(a)(2)(A).

18 47 U.S.C. § 272(a)(2)(C).

19 47 U.S.C. § 274(b).

20 *See* 47 U.S.C. § 272(f)(1) (manufacturing and interLATA telecommunications: 3 years from date of section 271(d) interLATA authorization); 47 U.S.C. § 272(f)(2) (interLATA information services: 4 years from enactment of the 1996 Act); Section 274(g)(2) (electronic publishing: 4 years from enactment of the 1996 Act).

And, to the extent any of these sunset provisions allow for extension of the separation requirement, the inherent presumption is that the requirements will expire and the burden is on the Commission to make findings that extension of the requirements is necessary.[21] Thus, these existing statutory separation requirements cannot be read as indicative of Congressional preference for adoption of additional separation requirements.

One need only look to Section 260[22] for further evidence that Congress does not prefer separate affiliates as the appropriate form of "safeguard." That section addresses conditions under which BOCs and other local exchange carriers may offer telemessaging services, including their voice mail and messaging services. Of course, Congress must be deemed to have been aware that BOCs and other LECs were offering these services on an integrated basis at the time of the passage of the 1996 Act. Yet, Congress clearly chose not to impose any form of separate affiliate requirement on these activities. Indeed, in previously declining to adopt its own separate affiliate requirement for these services, the Commission found it "significant" that Congress had chosen not to do so.[23] The Commission should find it just as significant in the broader context that Congress has chosen to enact a framework that favors the expiration of separation requirements.

Finally, BellSouth does agree with LCI that a policy that imposes different structural requirements on BOCs' information services depending on whether they are inter- or intraLATA

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21 *See, e.g.*, 47 U.S.C. § 272(f)(1); 47 U.S.C. § 272(f)(2).

22 Inexplicably, LCI cites Section 260, as well as Section 275, as examples of Congressional policy expressions in favor of separate subsidiary requirements. LCI Comments at n. 5, 6. Of course, neither of these sections imposes any kind of separate affiliate requirement.

23 *Non-Accounting Safeguards for Electronic Publishing, Telemessaging, and Alarm Monitoring, First Report and Order*, 12 FCC Rcd 5361, 5457 (1997).

in nature is "irrational and inefficient."[24] The solution, however, is not to impose *additional* regulations on BOCs' intraLATA service offerings, as LCI proposes. Rather, as BellSouth showed in its Comments, the Commission can avoid the inefficiencies of such dual regulatory schemes by forbearing from enforcing the statutory separate affiliate requirement of Section 272 for interLATA information services that BOCs are permitted to offer under Section 271(g)(4).[25]

III. THE 1996 ACT ABSOLVES THE COMMISSION OF ITS PERCEIVED TASK FOLLOWING THE *CALIFORNIA III* DECISION; SECTION 251-LIKE RIGHTS SHOULD NOT BE GRANTED TO ISPS

In the *California III*[26] decision, the Ninth Circuit faulted the Commission's prior structural relief analysis and conclusion for its failure to explain the Commission's reliance on ONA unbundling standards short of "fundamental unbundling" as part of the Commission's panoply of nonstructural safeguards. In this proceeding, the Commission has tentatively concluded that the passage of the 1996 Act, and particularly the unbundling requirements of Section 251,[27] sufficiently address the Ninth Circuit's concerns. Commenters supporting the Commission proposal agree that those concerns are and can be met without extending to ISPs direct rights like those granted carriers under Section 251. Parties disagreeing with the Commission's tentative conclusion have themselves failed to explain how the unbundling provisions of the Act would not inure to the benefit of ISPs.

As the Commission observed in the *Further Notice*, the unbundling obligations of the Act go well beyond the service and software unbundling of ONA. Indeed, the unbundling of network elements required by Section 251 subsumes the level of unbundling promoted by

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24 LCI Comments at 3.

25 BellSouth Comments at 19-21.

26 *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*").

27 47 U.S.C. § 251.

advocates of "fundamental unbundling" in the ONA proceedings. Thus, the Act directly addresses the deficiencies asserted by the Ninth Circuit in the Commission's past structural relief analyses.

That Section 251 imbues only "requesting telecommunications carriers" with direct rights to request and obtain access to unbundled network elements does not render that section ineffective in meeting the concerns of the Ninth Circuit. Indeed, comments confirm the Commission's expectation that ISPs would nonetheless reap the benefits of the unbundling standard in Section 251.[28]

The Commission should also be cautious not to conclude from the complaints of some smaller ISPs that they are not enjoying the same indirect benefits of Section 251 unbundling as are larger ISPs that further unbundling obligations should be imposed. What these ISPs essentially are recounting is a natural phenomenon in which the economics of the marketplace provide insufficient incentive for CLECs to respond to small ISPs' needs. While the implicit solution to this phenomenon from these ISPs' perspective is to require ILECs to provide direct unbundling rights to ISPs, the Commission should avoid compelling by regulatory fiat solutions that are not supported by marketplace economics. If ISP market demand is insufficient to drive CLECs to behave in a manner ISPs deem responsive to their needs, it should be seen as a signal that market demand does not warrant the necessary investment. The Commission should confirm that it is not up to ILECs to assume unjustifiable investment obligations merely to ensure that smaller ISPs are able to compete with larger ones or to serve niche markets.

Finally, USTA has noted that although the *Further Notice* primarily addresses matters that are uniquely applicable to BOCs, its discussion of Section 251-like unbundling rights for

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[28] *See, e.g.*, BellSouth Comments at 13-15; Ameritech Comments at 2-7; US West Comments at 20-25.

ISPs appears to apply more broadly to encompass all ILECs.[29] While BellSouth believes that no ILECs should be required to grant such rights to ISPs, the Commission should be particularly circumspect not to impose such obligations solely on BOCs under the guise of modified ONA safeguards. To do so would only exacerbate the disparities between the conditions imposed on BOCs' enhanced service operations and the conditions imposed on other ILECs' identical offerings, which – as BellSouth has shown – have never been justified.[30]

CONCLUSION

As shown in BellSouth's Comments and herein, the Telecommunications Act of 1996 obviates the need for regulatory surrogates for competition. Accordingly, BellSouth supports the Commission's initiatives in this proceeding to eliminate or streamline the regulatory burdens currently imposed on BOCs' intraLATA information service offerings.

Respectfully submitted,

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29 USTA Comments at 2-3.

30 BellSouth Comments at 5-10.

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	)	CC Docket No. 95-20

COMMENTS

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requirements, supplemented by developments in other proceedings, provide ESPs a reasonable opportunity to "pick and choose" or otherwise obtain unbundled services they need to develop their own services. Thus, existing requirements, absent "fundamental unbundling", are adequate to prevent the potential for "access discrimination" with which the Ninth Circuit was concerned.

III. The Three "Significant Instances Of Discriminatory Behavior" "Found" By The Georgia PSC And Recited By The Ninth Circuit Were Not Instances Of Discrimination At All; Therefore, The Georgia MemoryCall Decision Cannot Be Properly Cited As Evidence Of Competitive Abuse

No doubt, many of the BOCs' opponents in this proceeding will cite the Georgia PSC's "findings" of competitive abuses by BellSouth in its introduction of MemoryCall service[36] as "evidence" of past misbehavior by the BOCs and as grounds for denying any structural integration opportunities in the future. Those who do so,

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[36] See, In the Matter of the Commission's Investigation into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service, Docket No. 4000-U (Ga. PSC, June 4, 1991), ("Georgia MemoryCall Order"). BellSouth has previously provided the Commission with a copy of the entire record of the Georgia proceeding, including hearing transcripts, as a prelude to BellSouth's petition for preemption of the Georgia MemoryCall Order, which had frozen BellSouth's sale of MemoryCall service. As a result of that petition, the Commission did, in fact, preempt the Georgia PSC's order, Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, Memorandum Opinion and Order, FCC 92-18 (released Feb. 14, 1992) ("MemoryCall Preemption Order"), and the preemption decision was upheld on appeal, Georgia PSC v. FCC, No. 92-8257, 1993 U.S. App. LEXIS 24458 (11th Cir., Sept. 22, 1993) (per curiam).

however, will do so in error. The truth is that the MemoryCall decision provides no indication of actual competitive abuses by BellSouth.

As misdirected as that decision was, it is unfortunate that the Ninth Circuit gave it new life by referring to it in the California III decision. It would be even more unfortunate for the Commission, having opened the door to such discussion, to hear only one characterization of the Georgia MemoryCall Order. Thus, BellSouth takes this opportunity to provide greater insights to the MemoryCall decision than the Commission is likely to receive from competitors.

The Ninth Circuit referred to three "findings" by the Georgia PSC of "significant instances of discriminatory behavior by BellSouth."[37] The instances identified were: (1) "technical barriers" allegedly raised by BellSouth so that "competitors to MemoryCall could not use the local network, except to provide a service significantly inferior to MemoryCall;"[38] (2) BellSouth's refusal to permit nonaffiliated ESPs to collocate their equipment in BellSouth's central offices, "thereby perpetuating a distinction in product quality and price that disadvantages

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[37] California III, 39 F.3d at 929.

[38] Georgia MemoryCall Order, at 27.

competitors to MemoryCall;"[39] and (3) the "possibility"[40] that BellSouth had "manipulated development of the local network, especially the timing of unbundling of certain network features . . . in order to maximize its competitive advantage."[41] As shown below, none of these instances constituted discrimination or abuse of monopoly position by BellSouth.[42]

A. The "Technical Barriers" Issue

Contrary to the mischaracterization by the Georgia PSC repeated by the Ninth Circuit, BellSouth did not erect technical barriers to other ESPs' or voice messaging providers' use of the local network. In fact, BellSouth went beyond any existing legal or regulatory obligation, state or federal, to enhance its competitors' connections to

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[39] Georgia MemoryCall Order, at 28.

[40] Compare the hedging language used by the Georgia PSC on this issue, Georgia MemoryCall Order, at 28 ("evidence suggests the possibility that [BellSouth] has manipulated development . . ."), with subsequent interpretations or characterizations of this alleged finding, e.g., California III, 39 F.3d at 929 ("The Georgia PSC found . . . BellSouth had manipulated the development . . ."). Nonetheless, BellSouth will address this alleged instance of discrimination with the other two.

[41] Georgia MemoryCall Order, at 28.

[42] Some, of course, are likely to argue that BellSouth's explication herein is nothing more than a collateral attack on a past decision. That is not BellSouth's purpose. The purpose is to provide the Commission an appropriate framework for distinguishing the actual behavior exhibited by BellSouth in its introduction of MemoryCall service from the characterization of that behavior by the Georgia PSC.

the local network to allow their services to remain competitive with BellSouth's offering.

BellSouth obtained all known necessary regulatory approvals before introducing MemoryCall service. BellSouth filed its CEI Plan for voice messaging services in March 1988, and this Commission approved the plan in December of that year.[43]

BellSouth's tariff for the new or newly unbundled underlying network features was filed in Georgia the following year. By an order released April 17, 1990, the Georgia PSC allowed the tariff to go into effect for a one-year trial in the Atlanta area, concluding that "it is in the best interest of the customers who desire to offer voice messaging or other information services to have the option of subscribing to the special calling features."[44]

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[43] BellSouth Plan for Comparably Efficient Interconnection for Voice Messaging Services, 3 FCC Rcd 7284 (1988).

[44] Southern Bell Telephone Company's Proposed Tariff Revisions for Authority to Introduce an Experimental Tariff for a Group of New Optional Network Services and Bi-directional Usage Rate Service, Docket No. 3896-U (released April 17, 1990), at 4. The delay in tariff approval was due to two principal controversies: BellSouth's original proposal to require all purchasers of the special calling features, including its own MemoryCall operation, to utilize two-way measured usage access arrangements (which the PSC rejected in this order) and the PSC's belief, notwithstanding the FCC's view in the pre-California I era, that BellSouth should file tariffs for MemoryCall service. This order approving BellSouth's tariff makes no mention of "technical barriers" or other forms of discrimination against competing voice messaging providers. To the contrary, it acknowledges that BellSouth's tariff filing would present them "options".

BellSouth thus satisfied its obligation to make the same network capabilities that it uses in offering MemoryCall service available to others, at the same time, and at the same prices, and began offering MemoryCall service in Atlanta following that decision.

Notwithstanding that BellSouth had complied with all known requirements for introducing its service in a nondiscriminatory fashion, telemessaging service providers began making informal complaints to the Georgia commission. The gravamen of these complaints was that two call forwarding features useful to customers of voice messaging services would work with the network service architecture utilized by MemoryCall service, but would not work in all switch types with the network architecture the incumbents utilized.

Telemessaging providers typically subscribed to direct inward dial (DID) trunks to receive incoming calls for their customers. Under this arrangement, customers would forward their calls to a specific telephone number assigned to them by the telemessaging provider from its block of DID numbers. When incoming calls arrived on a number assigned to a particular customer, the telemessaging provider would know the customer on whose behalf it was receiving a call and could tailor its greeting accordingly or have the call directed to an appropriate mailbox. This arrangement worked

satisfactorily in all switch types with the pre-existing Call Forwarding-Variable feature.

In contrast, MemoryCall service utilized an architecture based on multiline hunt groups and a new feature known as Simplified Message Desk Interface, or SMDI. With SMDI, a messaging service provider did not need to have dedicated DID numbers associated with each of its customers because a customer's telephone number would be delivered to the messaging service provider with the incoming call, regardless of the line of the hunt group on which the call terminated. Not coincidentally, this SMDI feature was among those that had been requested by the telemessaging industry's trade organization during the course of development of the BOCs' original ONA plans.

As the record of the Georgia proceeding reflects, BellSouth included in its tariff of underlying network services two additional features that had been requested by the telemessaging industry and that MemoryCall intended to use -- Call Forwarding - Busy Line (CF-BL) and Call Forwarding - Don't Answer (CF-DA). The concern to the incumbent service provider was that neither CF-BL nor CF-DA would operate in a 1AESS switch to forward calls to another switch. Further, CF-DA would not forward to a DID trunk even within the same 1AESS switch. Thus, the utility of these features to ESPs with DID architectures was limited with respect to customers served by a 1AESS switch.

Notwithstanding that BellSouth had no obligation under this Commission's CEI requirements or under any previously articulated policy or requirement of the Georgia commission, BellSouth was already pursuing a solution of "fix" to the foregoing situation with the vendor of the 1AESS before the Georgia proceeding was initiated. In fact, negotiations with the vendor had begun as early as second quarter of 1989. During feature development, the vendor encountered a major software defect in the pre-existing Call Forward - Busy/Don't Answer program, which delayed initial availability of the fix until December, 1990, at which time deployment of the fix began. Further, as a result of negotiations regarding BellSouth's dissatisfaction with the development delay, the vendor committed to support an expedited deployment of this switch modification. BellSouth was thus able to reduce a typical 18 month deployment cycle to 7 months in Atlanta.

In light of the foregoing, the Georgia PSC's reliance on testimony that the desired capability "existed"[45] before BellSouth decided to introduce MemoryCall service was misguided. Until BellSouth undertook pursuit of this solution, the capability was not available to anyone in spite of its theoretical feasibility. In fact, as a result of its development efforts, BellSouth was the first local

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[45] Georgia Memory Call Order, at 31.

exchange carrier in the country to implement the technical solution in the 1AESS.

The Georgia PSC similarly misinterpreted testimony of prior requests for this functionality as evidence of demand sufficient to warrant its earlier deployment. No evidence of market demand was ever adduced to support that inference. In fact, by the time of the Georgia proceeding, over 1,000 digital switches in BellSouth's service territory already were equipped to provide CF-BL and CF-DA on both an inter- and intraoffice basis to customers of messaging service providers using DID access arrangements. As the Georgia record reflected, however, BellSouth averaged selling on the order of only one to two CF-BL and CF-DA features per month on a regionwide basis during the 15 months prior to the Georgia hearings.[46]

Additionally, BellSouth's pursuit of this solution was not without significant cost. Specifically, BellSouth spent $1,100,000 for its vendor to develop the upgrade to its 1AESS offices,[47] and another $500,000 to deploy the upgrade, in response to the insistence of the incumbent messaging service providers. As just noted, this expenditure was incurred in the absence of any cognizable actual market demand for the capability.

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[46] Georgia MemoryCall Proceeding, Hearing Transcript, at 506.

[47] Id. at 591.

That this "technical barrier" was nothing more than a red herring thrown into the Georgia proceeding is confirmed by market experience since the 1AESS upgrade was completed. Having spent over one and a half million dollars for this upgrade, BellSouth currently generates only about $12,000 annually in revenue from the sale of CF-BL and CF-DA features for non-MemoryCall related use. This experience justifies BellSouth's earlier caution in committing over a million dollars to have its vendor develop the 1AESS upgrade.

BellSouth's experience also confirms the validity of the Commission's ONA service selection criteria. Those criteria rightly require the unbundling or offering of network features only when it is both technically feasible and economically rational to do so. As demonstrated by the MemoryCall case, service development obligations based merely on bald requests, desires, or other unsubstantiated "demands", or on regulatory fiat can lead to economic dislocation and waste and to potentially stranded investment, with no offsetting public benefits.

Indeed, the imprudence and impracticality of the Georgia PSC's expectations with respect to BellSouth's introduction of MemoryCall service is evident when the PSC's reasoning is taken to its logical conclusion. By the rationale of the Georgia MemoryCall Order with respect to the "technical barriers" claim, BellSouth would be under an

obligation to upgrade any technology different from that used by its own enhanced service operation, regardless of the costs or absence of market demand. Moreover, this upgrade would be required to bring the different technology to the same capability level as that used by BellSouth's service (and otherwise available to anyone else who chooses to use it), before the latter technology could be used to deliver innovative services to customers. Clearly, this approach to service deployment stifles new service innovation, encourages the uneconomic deployment of network capabilities, and perpetuates older and different technologies simply for the purpose of coddling incumbent competitors.[48] Subjecting all technologies to such a commonality requirement on a broader scale would sharply reduce economic incentives to upgrade the public telecommunications infrastructure.

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[48] This lapse in the Georgia PSC's reasoning is perhaps best illustrated by applying it to other switch types. For example, much was made in the Georgia proceeding of the fact that a relatively high proportion of the offices in Atlanta in which MemoryCall service was available were 1AESS switches. What the Georgia PSC and the incumbent service providers ignored was that there were also 15 additional offices in the Atlanta local calling area where MemoryCall service was not readily available due to technical limitations. Thus, while BellSouth implemented the 1AESS fix to permit incumbent messaging service providers using DID trunks to have uniform service capability in 100% of the switches in the Atlanta area, MemoryCall service was limited to only 76% of the switches. By the Georgia PSC's logic, sales of messaging services by providers using DID arrangements should have been frozen until the features used by MemoryCall service could also be made available in 100% of the switches.

In sum, the "technical barriers" claim was and continues to be a red herring. BellSouth met all known regulatory obligations to which it was subject, including the tariffing of underlying capabilities which the Georgia PSC acknowledged provided "options" to other messaging service providers. BellSouth also spent $1.6 million to respond to an unsubstantiated and still undemonstrated claim of need, and did so even though during much of that time BellSouth's own sale of MemoryCall service was frozen by the Georgia PSC's order. Yet, rather than crediting BellSouth for having developed and offered the requested features despite the absence of demonstrated demand, the Georgia PSC characterized BellSouth's decision to upgrade the 1AESS switches as a "monopoly abuse." To the contrary, it is BellSouth that was and continues to be abused by the Georgia PSC's MemoryCall decision.

B. The "Collocation" Issue

The Georgia PSC's determination that BellSouth had discriminated against its potential competitors by not permitting them to collocate in BellSouth's central offices was equally flawed.

First, the Georgia MemoryCall Order selectively relied on only a portion of the testimony of the PSC's own staff witness to conclude erroneously that collocation of MemoryCall equipment in the central office gave MemoryCall service a cost advantage because "it eliminate[d] the need

for a local transport link to provide the service."[49] The decision conveniently failed to acknowledge that in the very next line of testimony, the witness corrected his earlier statements.[50] The order also ignored testimony from BellSouth's witness corroborating the corrected testimony of the staff witness.[51] On this basis alone, the Georgia MemoryCall Order is defective and cannot support a

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[49] Georgia MemoryCall Order, at 30, citing to the Hearing Transcript at p. 71, lines 4-23, and p. 185, lines 13-23.

[50] Hearing Transcript at p. 185, line 24 through p.186, line 7:

> I understand but it's not reflected in my testimony, that for that, if you will, [collocation] advantage, Southern Bell does incorporate in their cost of providing MemoryCall service a two-mile rule which was changed per some FCC proceedings on ONA in 1989, to give some recognition to the fact that that is a valuable asset to be able to include that hardware within the Southern Bell central office, and have applied those charges as if that hardware was located within a two-mile region or zone of the serving central office.

(emphasis added).

[51] Transcript at p. 502, lines 13 - 17:

> [A]s I said a minute ago, we pay in some cases, if the loop is distance sensitive, we pay more than a TAS [telephone answering service] would, as long as they're located less than two miles from the central office, and we would pay the same thing they would located more than that.

characterization of BellSouth's collocation policy as a discriminatory pricing practice.

Nor is the "finding" of asserted differences in quality of voice messaging service resulting from collocation sufficiently supported to sustain a characterization of discrimination by BellSouth. As above, the only support cited for this finding was the staff witness's speculative and conclusory assertion, without further elucidation, that collocation, in and of itself, enabled BellSouth to provide a higher quality voice mail service.[52] There was no evidence, however, that collocation had anything to do with the quality of the voice messaging service.

Even if the issue is viewed in terms of quality of network services, however, BellSouth gained no service quality advantage by not permitting competitors to collocate in its central offices. BellSouth's compliance with this Commission's CEI requirements mandates that the technical characteristics of the basic services provided by BellSouth

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[52] Transcript at p. 71:

> [BellSouth] places its voice mail equipment (including hardware) within its central offices, thereby enabling [it] to provide a higher quality voice mail service. . . . TAS Bureaus must place their voice mail equipment on their business premises. This reduces the quality of the voice mail . . . . If [BellSouth] granted . . . requests [for collocation] the voice mail quality distinction would be eliminated.

to other ESPs be equal to those used by BellSouth's own enhanced service. This CEI parameter was satisfied when BellSouth offered its competitors the same basic service connections and features as used by MemoryCall service. Moreover, there was never any claim, much less a finding, in the Georgia proceeding that the services to which BellSouth's competitors did subscribe were of deficient quality.

The validity of the Georgia PSC's reliance on the collocation issue as grounds for a finding of discrimination is further undermined by the fact that only a very small percentage of BellSouth's MemoryCall equipment is collocated with the customer's serving wire center. Due to MemoryCall's use of the SMDI access arrangements, BellSouth uses a centralized voice messaging platform. Because of the intraoffice limitations of SMDI, however, MemoryCall service must purchase direct connections between each host office it wishes to serve and the location of its voice messaging platforms. In the case of Atlanta, that amounts to over 45 multiline hunt group/SMDI arrangements. These circuits are physically and technically identical to, and subject to the same chances of cable cuts or other outside plant disruptions, as those used by any other customer. The "collocation issue" is therefore also a red herring.